

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



March 18, 2005

TO: INTERESTED PERSONS

RE: INVITATION TO SUBMIT WRITTEN COMMENTS ON PROPOSED PILOT PROGRAM (PUB. UTIL. CODE § 851)

Public Utilities Code Section 851 requires a public utility (other than an interstate railroad) to secure the Commission's authorization before selling, leasing, assigning, or otherwise disposing or encumbering property "necessary or useful" in the utility's service to the public. Applications to secure the Commission's approval under Section 851 are among the most common formal proceedings before this agency.

As a formal proceeding, a Section 851 application takes time; often results in significant costs for the applicant, other parties and the Commission; and may create uncertainties about the terms and conditions of approval. The cost, time, and risk of a formal proceeding may not be warranted in the case of many simple, uncontroversial Section 851 applications.

In the past, the Commission has acted to simplify the Commission's approval of some of these transactions. General Order (GO) 69-C, for instance, allows utilities to convey revocable licenses, easements, permits or other limited uses of property to third persons without prior Commission approval. Recently, the Commission authorized a public workshop concerning GO 69-C in proceeding P.02-02-003. The workshop participants suggested that GO 69-C is working reasonably well, but they urged the Commission to "streamline review of § 851 transactions, arguing that the time and cost required to process formal applications may prohibit desirable transactions from going forward."¹

¹ See generally, "Opinion Releasing Workshop Report and Closing Proceeding" in P.02-02-003, currently circulating for public review and comment pursuant to Pub. Util. Code § 311(g).

The ALJ Division is proposing an advice letter pilot program to simplify disposition of qualifying Section 851 transactions. If the pilot is authorized, certain types of Section 851 transactions will be processed under the pilot program procedures. Transactions will be eligible for pilot program treatment if they do not require environmental review by the CPUC under the California Environmental Quality Act (CEQA), have a positive effect on the public interest, do not exceed a certain financial ceiling, and satisfy other requirements. If a proposed transaction meets these criteria, the utility may obtain Commission approval by submitting an advice letter to the appropriate Industry Division. The Industry Division will review the advice letter pursuant to GO 96-A or its successor (processing of advice letters generally). Please note that the ALJ Division is not including any parcels or other transactions be submitted to the Commission under Section 851, regarding the transfer of lands from Pacific Gas and Electric Company (PG&E) in connection with the Land Conservation Plan to be established by the Governing Board of the Pacific Forest and Watershed Lands Stewardship Council ("Stewardship Council"). Consistent with the Stipulation adopted in Decision 03-12-035 in Investigation 02-04-026, these transactions require formal consideration under Section 851.

The pilot program will be conducted for a minimum of one year. Program results will be evaluated and will help the ALJ Division and Industry Divisions in recommending to the Commission whether such a program should be made permanent and, if so, with what procedural and substantive characteristics.

Attachment A describes the proposed pilot program. The ALJ Division is accepting comments on the proposed program during the next sixty days. After reviewing the comments, the ALJ Division may recommend that the pilot program begin. An ALJ Resolution, Order Instituting Rulemaking, or another method may be used to provide the Commission's authorization to begin the pilot program.

We invite comments from Commissioners and their staff, utilities, other organizations, and the public on the proposed pilot program. Comments should be sent to:

ALJ Lynn T. Carew
ALJ Peter V. Allen
ALJ Division, 5th Floor
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Email: luc@cpuc.ca.gov; pva@cpuc.ca.gov

Comments may be sent electronically or by regular mail. Comments should not be filed with the Docket Office. Comments should be served, either by email or regular mail, on those persons appearing on these service lists:

P.02-02-003/R.00-02-003

http://www.cpuc.ca.gov/published/service_lists/P0202003_37607.htm
http://www.cpuc.ca.gov/published/service_lists/R0002003_9347.htm

R.95-04-043/I.95-04-044

http://www.cpuc.ca.gov/published/service_lists/R9504043_997.htm
http://www.cpuc.ca.gov/published/service_lists/I9504044_997.htm

I.02-04-026

http://www.cpuc.ca.gov/published/service_lists/I0204026_39427.htm

R.98-07-038

http://www.cpuc.ca.gov/published/service_lists/R9807038_2198.htm

R.04-09-003

http://www.cpuc.ca.gov/published/service_lists/R0409003_66288.htm

The comment period runs through May 17, 2005.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:tcg

Attachment

ATTACHMENT A
SECTION 851 PILOT PROGRAM

SECTION 851 PILOT PROGRAM

Submitted by the ALJ Division
March 17, 2005

I. Summary

We propose a 12-month pilot program to test procedures for expediting Commission consideration of certain categories of Section 851 transactions. If successful, the pilot program will likely result in a decision or a new general order providing a more expeditious advice letter process for approving these Section 851 transactions.

II. Eligible Section 851 Transactions

- A. Criteria—The advice letter pilot program will apply to proposed transactions meeting the following conditions:
1. The activity proposed in the transaction will not require environmental review by the CPUC under the California Environmental Quality Act (CEQA) because: (a) no project is involved; or (b) a statutory or categorical exemption applies (the applicant must provide a notice of exemption or explain why an exemption applies).²
 2. The transaction will result in a positive effect on the public interest.
 3. Any financial proceeds from the transaction either will be (a) booked to a memorandum account for distribution between shareholders and ratepayers during the next general rate case for that utility, or

² We seek comment on whether a streamlined process such as that contemplated here can also include those transactions where a lead agency other than the CPUC has completed the environmental review under an environmental impact report or a negative declaration and the lead agency has found no significant unavoidable environmental impacts. Obviously, inclusion of this type of transaction in the proposed pilot increases the number of transactions for which Commission review could be streamlined; however, serious concerns have been raised that the nature of the Commission's review of these transactions as a responsible agency requires a more detailed process than can be accommodated under the advice letter pilot proposal. We encourage commenters to provide practical suggestions for resolution of this conflict.

(b) immediately divided between shareholders and ratepayers based on a specific distribution formula previously approved by the Commission for that utility.

4. The property that is the subject of the transaction is no longer necessary or useful in regulated utility operations.
5. If the transaction results in a fee interest transfer, the property does not have a fair market value in excess of \$500,000.
6. If the transfer is a lease or a lease-equivalent, the total net present value of the lease payments, including any purchase option, does not have a fair market value in excess of \$500,000, and the term of the lease will not exceed 10 years.
7. If the transaction involves a transfer or change in ownership of facilities currently used in regulated utility operations, the transaction will not result in a physical or operational change in the facility other than in the normal course of business.
8. This pilot program excludes any parcels or other transactions to be submitted to the Commission under Section 851 by Pacific Gas and Electric Company (PG&E), consistent with the Land Conservation Plan to be established by the Governing Board of the Pacific Forest and Watershed Lands Stewardship Council ("Stewardship Council"). Consistent with the Stipulation adopted in Decision 03-12-035 in Investigation 02-04-026, these transactions require formal consideration under Section 851.

B. Mandatory participation; exceptions

1. Participation in the pilot program is mandatory for all eligible transactions.
2. If a formal application is mistakenly filed seeking approval of an eligible transaction, the Chief or Assigned ALJ may dismiss or stay the formal proceeding and transfer the application to the appropriate Industry Division for processing as an advice letter under the pilot program.

3. For any of the following reasons, an Industry Division may determine that the approval of an advice letter filing under the pilot program is inappropriate:
 - a. The proposed transaction does not satisfy the criteria for the pilot program.
 - b. The proposed transaction presents unusual issues of fact or law that require more complete fact-finding and informed decisionmaking.
 - c. The proposed transaction is inappropriate for advice letter consideration because it involves the exercise of discretion or is otherwise barred by General Order 96-A or its successor.
4. Having stated the reasons for determining that an advice letter filing is inappropriate for the pilot program, the Industry Division may reject the advice letter filing pursuant to General Order 96-A or its successor, without prejudice to the applicant to refile the request as a formal proceeding.

C. Advice letter filing procedures

1. Proposed section 851 filings that are eligible for the pilot program will be submitted to the appropriate Industry Division as an advice letter in accordance with General Order 96-A or its successor.
 - a. By the time the pilot program commences, certain provisions of General Order 96-A may have been superseded as the result of the Third Interim Opinion in *Rulemaking for Purposes of Revising General Order 96-A Regarding Informal Filings at the Commission*, R.98-07-038.
 - b. Under proposed advice letter procedures, the filing of an advice letter commences a 30-day review period by staff. Before the end of the initial 30-day period, staff may notify utility that review will be extended for another 120 days (or longer if the utility agrees). If the staff does not suspend effectiveness within initial 30 days, the advice letter becomes effective at end of 30 days. At the end of the 150-day period (30 + 120), the Industry Division must either issue its disposition or prepare an appropriate resolution for the Commission.

2. In addition to other information required by General Order 96-A or its successor, the advice letter will include the following information:
 - a. Identity of all parties to the proposed transaction.
 - b. Complete description of the property including present location, condition, and use.
 - c. Complete description of the financial terms of the proposed transaction.
 - d. If a transfer of a property interest (including, without limitation, a fee, easement, or leasehold interest) is involved, the original cost, present book value, and present fair market value (indicated by a reputable appraisal) of the property.
 - e. Indication of how the financial proceeds of the transaction will be distributed.
 - f. Recent photographs of the property; and, if real property is involved, a scaled map of the property.
 - g. Sufficient information and documentation (including environmental review information) to indicate that all criteria set forth in section II(A), *above*, are satisfied.
3. Notification and service of the advice letter will be in accordance with General Order 96-A or its successor. In all cases, a copy of the advice letter will be noticed in the *Daily Calendar* and served on the appropriate Industry Division, ORA, and the CPUC CEQA team.
4. The appropriate Industry Division will review and process the advice letter in accordance with General Order 96-A or its successor. In addition to the reasons stated in General Order 96-A or its successor for disapproving the advice letter, the Industry Division may reject the advice letter for the reasons set forth in section II(B)(3) *above*.

5. The approval or disapproval of an advice letter may be reconsidered or appealed as provided by General Order 96-A or its successor or by other applicable provisions of law.

(END OF APPENDIX A)

APPENDIX B

SECTION 851 PILOT PROGRAM

SECTION 851 PILOT PROGRAM

ALJ Division

I. Summary

We initiate a 24-month pilot program to test procedures for expediting Commission consideration of certain categories of Section 851 transactions. If successful, the pilot program will likely result in a decision or a new general order providing a more expeditious process for approving these Section 851 transactions.

Participation in the pilot program is optional. Applicants may choose to submit a regular application under section 851 for transactions that qualify for this pilot project.

This pilot program is not available to Class A water companies.

II. Eligible Section 851 Transactions

- A. Criteria—The advice letter pilot program will apply to proposed transactions meeting the following conditions:
1. The activity proposed in the transaction will not require environmental review by the CPUC as a lead agency under the California Environmental Quality Act (CEQA) because a statutory or categorical exemption applies (the applicant must provide a notice of exemption or explain why an exemption applies), or an environmental document has already been prepared by another entity acting as lead agency
 2. The transaction will not have an adverse effect on the public interest.
 3. Any financial proceeds from the transaction either will be (a) booked to a memorandum account for distribution between shareholders and ratepayers during the next general rate case or other applicable proceeding for that utility, or (b) immediately divided between shareholders and ratepayers based on a specific distribution formula previously approved by the Commission for that utility.
 4. If the transaction results in a fee interest transfer, the property does not have a fair market value in excess of \$5 million.
 5. If the transaction is for the sale of depreciable assets, the property does not have a fair market value in excess of \$250,000

6. If the transfer is a lease or a lease-equivalent, the total net present value of the lease payments, including any purchase option, does not have a fair market value in excess of \$5 million, and the term of the lease will not exceed 25 years.
7. If the transaction involves a transfer or change in ownership of facilities currently used in regulated utility operations, the transaction will not result in a physical or operational change in the facility other than in the normal course of business.
8. This pilot program excludes any parcels or other transactions to be submitted to the Commission under Section 851 by Pacific Gas and Electric Company (PG&E), consistent with the Land Conservation Plan to be established by the Governing Board of the Pacific Forest and Watershed Lands Stewardship Council ("Stewardship Council"). Consistent with the Stipulation adopted in Decision 03-12-035 in Investigation 02-04-026, these transactions require formal consideration under Section 851.

III. Review Process

A. Industry Division Review

1. Proposed section 851 filings that are eligible for the pilot program will be submitted to the appropriate Industry Division as an advice letter in accordance with General Order 96-A or its successor.
 - a. By the time the pilot program commences, certain provisions of General Order 96-A may have been superseded as the result of the Third Interim Opinion in *Rulemaking for Purposes of Revising General Order 96-A Regarding Informal Filings at the Commission*, R.98-07-038.
 - b. For transactions subject to a statutory or categorical exemption from CEQA, under proposed advice letter procedures, the filing of an advice letter commences a 45-day review period by staff. Before the end of the initial 45-day period, staff may notify utility that review will be extended for another 60 days (or longer if the utility agrees). If the staff does not suspend effectiveness within initial 45 days, the advice letter becomes effective at end of 45 days. At the end of the 105-day period (45 + 60), the Industry Division must either issue its disposition or prepare an appropriate resolution for the Commission.
 - c. For transactions where the Commission is a responsible agency under CEQA, automatic approval without express Commission action is not allowed. Under proposed advice letter procedures, the filing of an advice letter commences a 45-day review period by staff. That review period is automatically extended for another 60 days to allow staff to review the environmental documents. Before the end of the initial 45-day period, staff should, as a courtesy, notify utility that review will be extended for another 60 days (or longer if the utility agrees). At the end of the

105-day period (45 + 60), the Industry Division must either reject the advice letter or prepare an appropriate resolution for the Commission.

2. For any of the following reasons, an Industry Division may determine that the approval of an advice letter filing under the pilot program is inappropriate:
 - a. The proposed transaction does not satisfy the criteria for the pilot program.
 - b. The proposed transaction presents unusual issues of fact or law that require more complete fact-finding and informed decisionmaking.
 - c. The proposed transaction is inappropriate for advice letter consideration because it involves the exercise of discretion or is otherwise barred by General Order 96-A or its successor.
3. Having stated the reasons for determining that an advice letter filing is inappropriate for the pilot program, the Industry Division may reject the advice letter filing pursuant to General Order 96-A or its successor, without prejudice to the applicant to refile the request as a formal proceeding.

B. Contents of Advice Letters

1. In addition to other information required by General Order 96-A or its successor, the advice letter will include the following information:
 - a. Identity of all parties to the proposed transaction.
 - b. Complete description of the property including present location, condition, and use.
 - c. Buyer's or lessee's intended use of the property.
 - d. Complete description of the financial terms of the proposed transaction.
 - e. Indication of how the financial proceeds of the transaction will be distributed.
 - f. Sufficient information and documentation (including environmental review information) to indicate that all criteria set forth in section II(A), *above*, are satisfied.
 - g. Complete description of any recent past (within the prior two years) or anticipated future transactions that may appear to be related to the present transaction, such as sales or leases of real property that are located near the property at issue or that are being transferred to the same recipient, or for depreciable assets, sales of similar assets or sales to the same recipient.

- h. For sales of real property and depreciable assets, the advice letter shall include the original cost, present book value, and present fair market value, and a detailed description of how the fair market value was determined (e.g., appraisal).
- i. For leases of real property, the advice letter shall include the fair market rental value, and a detailed description of how the fair market rental value was determined.
- j. The filing utility may submit additional information to assist in the review of the advice letter, including recent photographs, scaled maps, drawings, etc.
- k. For all transactions, the advice letter shall include the following CEQA checklist:

CEQA checklist:

Exemption

- (1) Has the proposed transaction been found exempt from CEQA by a government agency?
 - (a) If yes, please attach notice of exemption. Please provide name of agency, date of exemption, and state clearinghouse #.
 - (b) If no, does the applicant contend that the project is exempt from CEQA? If yes, please identify the specific exemption or exemptions that apply, citing to the applicable CEQA guideline(s).

Prior or Subsequent CEQA review

- (1) Has the project undergone CEQA review by another government agency? If yes, please identify the agency, the CEQA document that was prepared (EIR, MND, etc.) and its date, and provide one copy of any and all CEQA documents to the Director of the relevant Industry Division with a copy of the advice letter. Be prepared to provide additional copies upon request.
- (2) Identify any aspects of the project or its environment that have changed since the issuance of the prior CEQA document.
- (3) Identify and provide section and page numbers for the environmental impacts, mitigation measures, and findings in the prior CEQA document that relate to the approval sought from the CPUC.
- (4) Does the project require approval by governmental agencies other than the CPUC? If so, please identify all such agencies, and the type of approval that is required from each agency.

Need CEQA?

If no exemption is applicable, and no prior review has occurred, please identify what applicant believes is the correct level of CEQA review.

2. Notification and service of the advice letter will be in accordance with General Order 96-A or its successor. In all cases, a copy of the advice letter will be noticed in the *Daily Calendar* and served on the appropriate Industry Division, ORA, and the CPUC CEQA team, plus the relevant departments of the city and county where any real property involved in a transaction is located, and shall also be served electronically on Lynn Carew and Peter V. Allen at lrc@cpuc.ca.gov and pva@cpuc.ca.gov.
3. The approval or disapproval of an advice letter may be reconsidered or appealed as provided by General Order 96-A or its successor or by other applicable provisions of law.

(END OF APPENDIX B)